NO. 4504

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BOOTH FISHERIES COMPANY,
a corporation,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Division Number One.

Petition for Rehearing

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Comes now the United States of America, defendant in error, and respectfully petitions this honorable court for a rehearing herein on the ground that Congress intended sections 3 and 4 of the Act of June 6, 1924, commonly known as the White Bill, and in particular those provisions of said sections pertaining to obstructions and to fishing operations within 500 yards of the mouths of streams into which salmon run, to become operative and effective to protect salmon at the mouths of streams on June 6, 1924, and not when, and only when, after June 6, 1924, the mouths of such streams could be

determined and marked by the Secretary of Commerce.

The Court in its opinion says:

> "The court below was of the opinion that the amendment of 1924, providing that the mouth of a stream shall be taken to be the point determined as such by the Secretary of Commerce and marked in accordance with his determination, made no change in the then existing law, unless and until the Secretary of Commerce saw fit to exercise the authority thus conferred. In other words, that the question whether the law has been changed or not depends not upon the law itself but upon the action or inaction of the Secretary of Commerce."

The court in its opinion says that it cannot agree with the lower court's construction that whether the law was changed or not depends not upon the law itself but upon the action or inaction of the Secretary of Commerce, YET THE COURT HOLDS THAT THE VERY LAW ITSELF IS OPERATIVE OR INOPERATIVE DEPENDING UPON THE ACTION OR INACTION OF THE SECRETARY.

It is very evident that we did not make our views in this respect clear to the court for we do not contend that the law has not been changed. Our contention is that the statutes referring to the mouths of creeks, streams and rivers, including the provision for the determination of the mouth by the Secretary, became effective June 6, 1924, when the law was approved; that a creek, stream or river con-

tinued to have a mouth for the purposes of these sections even though the point or place where the mouth was had not been determined and marked by the Secretary; that for the purpose of the sections the mouth of a creek, stream or river emptying into tidewater is the point or place where the fresh waters of the stream unite with the salt waters of the sea at mean, that is, the average, low tide, where the courts of the Territory, Bureau of Fisheries officials and fishermen since the passage of the Act of June 26, 1906, had supposed it was; and that the duty of determining and marking this point or place, in order to designate it and thus make it more definite and certain of location by fishermen, was imposed upon the Secretary; and that the Secretary had authority by the new statute to depart from the theretofore accepted definition of the mouth of a stream and determine and mark, in the sense of establish and mark, another point or place as the mouth of a stream, if in his discretion exercised in good faith salmon could be more adequately protected.

If the provisions for protecting the mouths of salmon streams under the Act of June 6, 1924, become operative only when the mouths of such streams are determined and marked, and the protection afforded by the amended sections of the Act of 1906 ceased on June 6, 1924, as indicated by the court's opinion, the Secretary of Commerce, by withholding action, would have the power to nullify

the express intent of Congress to protect the mouths of salmon streams; the statutes would become operative to protect the mouths of salmon streams from day to day as the Bureau of Fisheries determined and marked each stream; obstructions and fixed and movable fishing gear could be kept and maintained lawfully within 500 yards of the mouths of salmon streams in direct opposition to the intent and will of Congress, as expressed in sections 3 and 4 until the Secretary could act; instead of making the point or place of the mouth of a stream definite and certain, there would in the meantime be nothing definite or certain, for, until the Secretary could act, a stream would in fact have a mouth, but in theory it would have no mouth at all; and the express intent of Congress to protect the mouths of salmon streams would have been disregarded, at least temporarily.

The court in its opinion says:

> "Congress might itself define the mouth of a stream or it might delegate that authority to the Secretary of Commerce, or some other officer. It chose the latter course here and the determination of the Secretary of Commerce, WHEN MADE, has the force and effect of law."

We thoroughly agree with the statement that the Secretary's determination and marking of the mouth of a stream, WHEN MADE, has the force and effect of law. But in the meantime, until a determination and marking IS MADE, the provisions of sections 3 and 4, pertaining to the mouths of

streams, according to the opinion, are not in operation at all. Such interpretation of the statutes appears to us inconsistent with the intention of Congress, in amending the Act of 1906, to more adequately protect the salmon supply of Alaska.

Since the passage of the Act of 1906, the courts of Alaska, the Bureau of Fisheries officials and fishermen have considered the mouth of a stream emptying into tide water as that point or place where the fresh waters of the stream unite with salt waters of the sea at mean, that is, the average, low tide. Although the mouths of salmon streams were not determined or marked under the Act of 1906, the mouths of such streams were, nevertheless, under this interpretation of the amended statutes, established, and were fairly definite and certain of determination in any particular case. We believe that Congress in passing the amendatory statutes of 1924 were well acquainted with this interpretation of the amended statutes. We believe that Congress, in amending the statutes of 1906 by adding the words: "For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination", imposed upon the Secretary the duty of determining and marking the point or place where the fresh waters of a stream united with the salt waters of the sea at mean low tide in order to make such point or place more definite and cer-

tain for fishermen; and that authority was also given to the Secretary to depart from the theretofore accepted definition of the mouth of a stream and determine, in the sense of establish, and mark another point or place as the mouth of such a stream, if in his discretion exercised in good faith salmon could be more adequately protected.

Such a construction of the statute would not conflict with this court's opinion where it is said:

> "A point five hundred yards from the place where the fresh and salt waters meet at low tide might in some cases be less than five hundred yards from the point where the stream enters the cove, and it may well be that the purposes of the statute would be best subserved by locating the mouth of the stream at the point where it enters the cove, rather than at the point on the tide flats where the fresh and salt waters meet at low tide."

The lower court in instructing the jury that it was not material as to either information whether the mouth of the stream had been determined or marked by the Secretary of Commerce or not, did not mean that the provision for determining and marking the mouths of streams was of no effect, or that the law had not been changed. The lower court did mean that it was illegal to obstruct or fish a salmon stream within 500 yards of its mouth whether the mouth was determined and marked or not; and, until the Secretary determined and marked the mouth, the mouth was where the courts of Alaska, the Bureau officers and fishermen had for eighteen years sup-

posed it was. In the meantime, that is, until the Secretary acted, the lower court by its instruction affirmatively carried out the intention of Congress to protect the salmon supply from utter depletion.

Our contention in this respect does not conflict with the court's opinion where it is said:

> "It is suggested by counsel that these objections do not extend to the information based on section 4 of the Act, because that section does not contain the provisions that the mouth of a stream is the point determined to be such by the Secretary of Commerce, but, in our opinion, Congress never contemplated that a stream could have two mouths for the purposes of the Act; one to be determined and marked by the Secretary of Commerce, the other to be fixed or ascertained by the court or jury. If the contention of counsel is correct, the trap might be lawfully maintained under section 3, but could not be lawfully used or operated under section 4."

Our contention makes it illegal to obstruct a salmon stream within 500 yards of its mouth under section 3, or to fish for salmon within five hundred yards of its mouth under section 4, from the day of the adoption of the Act of 1924, to wit, June 6, 1924, and until the Secretary of Commerce determines and marks the mouths of such streams; that when the mouth of each stream is determined and marked, the old interpretation must give way and the Secretary's determination and marks govern.

That the intention of Congress was to continue to protect the mouths of salmon streams in Alaska im-

mediately and not dependent upon action or inaction of the Secretary of Commerce is clear. For some time prior to the passage of the Act of 1924, Congress was confronted by the fact that the fisheries of Alaska were being rapidly depleted. On April 22, 1924, in a report by the Senate Committee on Commerce, to accompany H. R. 8143 (Act of June 6, 1924) it was said:

> "All who have studied the situation and are interested in a permanent supply of fish are a unit in contending that depletion of the salmon supply has already occurred, and that the utter destruction of the industry will follow if real remedial measures are not promptly taken.
>
> "The waters of Alaska are so vast and the local conditions so varied that it is utterly impossible to prescribe by legislation in detail the provisions necessary to meet each situation. To attempt to do so would be to defeat the purposes sought. This can be done by placing broad powers and a wide discretion in the administrative branch having charge of the subject.
>
> "This Act (Act of 1924) is not perfect. It does not wholly satisfy anybody. We are sure, however, that it is a very substantial move in the right direction. If it can be passed and ample provisions made to carry it out, the Alaska fisheries will be permanently maintained."

From the foregoing, we feel reasonably certain that the intent of Congress in amending sections 3 and 4 of the Act of 1906, by the Act of 1924, was to protect more adequately the salmon in Alaskan waters. We feel equally confident in saying that the intent of Congress in amending sections 3 and 4

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determination and marks govern the situation. To hold otherwise would be placing a premium on form, and minimizing, if not destroying, the effect and value of substance.

We urge this rehearing because the matter presented is of the greatest importance to the fishing industry in the Territory. In fact, the seriousness of the situation is such that it cannot be overstated; and not having made ourselves sufficiently clear upon the previous hearing touching the exact point we desire to urge, we respectfully ask for a rehearing in order that our contention may be more fully and more clearly stated.

Respectfully submitted,

ARTHUR G. SHOUP,
United States Attorney,
HOWARD D. STABLER,
Asst. U. S. Attorney,

Certificate of Counsel:

We hereby certify that in our judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

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was to continue immediate prohibition against obstructions and fishing operations within 500 yards of the mouths of all creeks, streams and rivers into which salmon run. We think the statutes should be so construed as to carry out the intent of Congress.

The authors of 36 Cyc. 1106, say:

> "The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature."

And in the same volume at page 1111:

> "Where the proper construction of a statute is otherwise doubtful, arguments from the inconvenience, absurdity, injustice, or prejudice to the public interests, resulting from a proposed construction, may be considered."

The authors of 25 R.C.L. 960, section 216, say:

> "In the interpretation and construction of statutes the primary rule is to ascertain and give effect to the intention of the legislature. As has frequently been stated in effect, the intention of the legislature constitutes the law. All rules for the interpretation and construction of statutes of doubtful meaning have for their sole object the discovery of the legislative intent, and they are valuable only in so far as, in their application, they enable us the better to ascertain and give effect to that intent. Even penal laws, which it is said should be strictly construed, ought not to be so construed as to defeat the obvious intention of the legislature."

At page 1012, section 252, the same authors say:

> "In construing a statute, the intention of the legislature is to be ascertained not merely from the language of the act taken as a whole, but,

where the language is not free from ambiguity, from the application of the act to existing circumstances and necessities. Where the words of a statute are not explicit, the intention of the legislature is to be collected from the context, by considering the subject matter, by looking to the occasion and necessity for the law and the circumstances under which it was enacted, to the mischief to be remedied, the object to be attained and the remedy in view, by comparing one part with the other and giving effect to the whole, by looking to the old law upon the subject, if any, and to other statutes upon the same or similar subjects, BY CONSIDERING THE EFFECTS AND CONSEQUENCES OF A PARTICULAR CONSTRUCTION, and by looking to contemporaneous construction of the statute."

Again, at page 1013, section 252, the same authors say:

"The language of a statute must be read in a sense which harmonizes with the subject matter and the general purpose and object of the statute * * * * The general design and purpose of the law is to be kept in view and the statute given a fair and reasonable construction with a view to effecting its purpose and object, EVEN IF IT BE NECESSARY, IN SO DOING, TO RESTRICT SOMEWHAT THE FORCE OF SUBSIDIARY PROVISIONS THAT OTHERWISE WOULD CONFLICT WITH THE PARAMOUNT INTENT. AN INTERPRETATION WHICH DEFEATS ANY OF THE MANIFEST PURPOSES OF THE STATUTE CANNOT BE ACCEPTED. Every statute, it has been said, should be construed with a reference to its object, and the will of the lawmakers is best promoted by such a construction as

secures that object and excludes every other."

At page 1015, section 254, it is said:

> "* * * * Although a penal statute cannot be extended by construction, it should, if possible, receive such a construction as, when practically applied, will tend to suppress the evil which the legislature intended to prohibit."

At page 1018, section 256, it is said:

> "When the language of a statute fairly permits, a construction which will lead to an unreasonable result should be avoided."

At page 1017, section 255, it is said:

> "* * * * When a statute is ambiguous in terms or fairly susceptible of two constructions, the injustice, unreasonableness, absurdity, hardship, or even the inconvenience which may follow one construction may properly be considered and a construction of which the statute is fairly susceptible may be placed on it that will avoid all such objectionable consequences and advance what must be presumed to be its true object and purposes."

In the case of Thiele v. City of Philadelphia (Supreme Court of Pennsylvania, 1914), 91 A. 490, the court says:

> "We have already indicated that the act of 1913 did not go into operation automatically, but that it required definite action upon the part of the city councils to make it effective. It did contain a repealing clause, the effect of which must now be considered. If it repealed all former laws inconsistent with its provisions as of the date of its approval, and the new law for the reasons above stated is not in force, it would necessarily follow that the city is without

> any law regulating sanitary inspection at the present time. If such a result necessarily followed, it would be most unfortunate; but, according to our view of the law it is not necessary to so hold.
>
> "It is well settled that where the provisions of a revising statute are to take effect at a future period, or upon the happening of a certain contingency, or the doing of certain acts, and the statute contains a clause repealing former laws on the same subject, the repealing clause does not take effect until the provisions of the repealing act go into operation. (Citing authorities) * * * * Many other authorities might be cited to the same effect.
>
> "* * * * The same may be said of the case at bar. The old law remains in force until it is superseded by the organization of the division of housing and sanitation under the act of 1913, and the repealing clause of this act does not take effect until the new law goes into operation."

If the foregoing authorities correctly state the law, we think the interpretation of the mouth of a stream under the Act of 1906 should continue in full force and effect until the Secretary of Commerce determines and marks the mouths of salmon streams according to the provisions of the Act of 1924. We cannot think of any other interpretation of the statutes of 1924 that will give force and effect to the intent of Congress to immediately further protect the salmon supply at the mouths of salmon streams in Alaskan waters.

Congress must have known that the waters of Alaska are vast; that the land area is equal in size

to one-fifth of the land area of the United States; that the coast line of Alaska extends over approximately twenty-five hundred miles; and that there are thousands of creeks, streams and rivers in Alaska into which salmon run. The fact that it would take the Secretary of Commerce some considerable time after the Act of 1924 became effective to determine and mark the mouths of salmon streams must, also, have been known. Congress must have realized that if these provisions were to become operative and effective only when the Secretary acted there was no protection to salmon at the mouths of streams under the new Act of 1924 until the Secretary could act, unless protection under the Act of 1906 was continued in effect. It seems so plain as to be beyond contradiction, that Congress did not intend to leave the mouths of salmon streams after June 6, 1924, dependent for protection upon the future acts of the Secretary of Commerce.

For these reasons we respectfully contend that the lower court correctly instructed the jury to the effect that it was not material, as to the two informations against Booth Fisheries Company, whether the mouth of Lucky Cove Creek had been determined or marked by the Secretary; that when the mouth was determined and marked the determination and marks govern; that in the absence of such determination and marking, the place or location of the mouth of the Creek was a question of fact for the determination of the jury, under the instruc-

tions of the court, and:

> "To this end, I charge you that the mouth of a stream emptying into tidewater, is the point or place where the waters of the stream meet tidewater at mean low tide. It is not where the waters of the stream meet tidewater at high tide, but where the waters of the stream meet tidewater at mean—that is, the average—low tide."

The jury found as a fact that Lucky Cove Creek was a creek into which salmon ran. The creek surely had a mouth even though the point or place where the mouth was had not been determined and marked by the Secretary of Commerce. Congress by the Act of 1906, and also by the Act of 1924, made it unlawful to erect or maintain obstructions, or to fish for or take salmon, within 500 yards of the mouth of a salmon stream; and, we think, this protection was not qualified or limited to salmon streams the mouths of which would at some future time be determined and marked by the Secretary of Commerce. Booth Fisheries Company erected and maintained an obstruction on June 25, 1924, and fished for and took salmon on July 26, 1924, and thereafter, within 500 yards of the point or place where the fresh waters of Lucky Cove Creek united with the salt waters of Lucky Cove at mean low tide, the point which, in Alaska, for eighteen years had been considered the mouth of a creek emptying into the sea. Yet the court's opinion holds in effect that because the mouth of Lucky Cove Creek had not been deter-

mined and marked Lucky Cove Creek had no mouth at all; and that it was not unlawful to do these acts (presumably after June 6, 1924) because the Secretary had not determined and marked where the mouth was; or if he had determined where the mouth was that he had not placed some kind of a mark there to designate it; or, because the mouth had not been determined and marked, that it was uncertain where the mouth was.

The court says in the opinion:

> " * * * In any event, the place where the mouth of the stream shall be located rests in the discretion of the Secretary of Commerce, and the location of the mouth of the stream by the Secretary is indispensable to give certainty and precision to the statute. Until that has been done, the initial point from which measurements are to be made cannot be known, and without an initial point from which to measure it would, of course, be impossible to determine the boundaries of the prohibited area."

Booth Fisheries Company knew where the mouth of Lucky Cove Creek was, for this Company pleaded guilty to a charge of illegal fishing on October 1, 1923, and was fined $400 for fishing by means of a fish trap within 500 yards of the mouth of Staney Creek on Prince of Wales Island (Case No. 822 KB, District Court, First Division, District of Alaska); and the mouth of Staney Creek was where the creek waters of Staney Creek united with the salt waters of Tuxecan Passage at mean low tide. There was nothing indefinite or uncertain about where the

mouth of Stancy Creek was. There have been many similar cases in the First Division of Alaska and there has never heretofore been any uncertainty about determining the point or place where the mouth of a salmon stream emptying into salt water was. It may be that in this case the equities of the situation entitle Booth Fisheries Company to mitigating consideration. But the equities or mitigating circumstances of the case, if there are any, do not affect the guilt or innocence of an offender in this kind of case. The doing of the inhibited act constitutes the crime. Thlinket Packing Co. vs. United States (CCA-9, 1916) 236 Fed. 113.

To say that the provisions of amending sections 3 and 4, pertaining to obstructions and fishing operations within 500 yards of the mouth of a creek, stream or river into which salmon run, must be construed as being in a state of repose after June 6, 1924, and until the Secretary of Commerce can determine and mark the mouths of such creeks, streams and rivers, is placing an interpretation thereon of strict and literal severity. The essence, the very quintessence, of the statutes is to give immediate further protection to salmon entering the mouths of fresh water streams to spawn in the fresh waters of such streams. We contend that the mouth of a stream emptying into salt water is the point or place where the fresh waters of the stream unite with salt waters of the sea at mean low tide; when the Secretary determines and marks the mouth, the

determination and marks govern the situation. To hold otherwise would be placing a premium on form, and minimizing, if not destroying, the effect and value of substance.

We urge this rehearing because the matter presented is of the greatest importance to the fishing industry in the Territory. In fact, the seriousness of the situation is such that it cannot be overstated; and not having made ourselves sufficiently clear upon the previous hearing touching the exact point we desire to urge, we respectfully ask for a rehearing in order that our contention may be more fully and more clearly stated.

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